

<b>MILDRED I. HAWKS</b>	)	
Claimant	)	
	)	
V.	)	
	)	
<b>DEPARTMENT OF REVENUE</b>	)	
Respondent	)	Docket No. 1,056,444
	)	
AND	)	
	)	
<b>STATE SELF INSURANCE FUND</b>	)	
Insurance Carrier	)	

## STATEMENT OF THE CASE

The ALJ found claimant's December 23, 2010, injury arose out of and in the course of her employment with respondent. The ALJ found claimant sustained a 50 percent impairment to the left knee, 10 percent of which is preexisting, for an impairment of 40 percent to the left knee related to the work accident. The ALJ determined claimant is entitled to future medical care upon application and review and unauthorized medical care up to the statutory limit.

## ISSUES

Respondent argues the more credible evidence supports a finding that claimant sustained a 12.5 percent functional impairment to the left knee as a result of her accidental injury. Respondent maintains the opinion of Dr. Gurba, which attributes 75 percent of

claimant's impairment to preexisting conditions, is more credible and should be given greater weight than the opinion of Dr. Prostic.

Claimant contends the ALJ's Award should be affirmed. Claimant argues the methodology for how Dr. Gurba arrived at his opinion is not in evidence; however, because Dr. Prostic testified in detail regarding how he attributed 10 percent of claimant's impairment to preexisting conditions, his opinion should be given greater weight.

The issue for the Board's review is: what is the nature and extent of claimant's disability?

#### **FINDINGS OF FACT**

Claimant has been employed with respondent in a clerical position since 2001. On December 23, 2010, claimant sustained an injury when she swivelled in her chair and struck her left knee on the edge of a file cabinet. Claimant reported the incident to her supervisor and received conservative medical treatment.

Claimant has a medical history of bilateral knee problems. In May 2004, claimant underwent a left knee arthroscopic chondroplasty of the patella and medial femoral condyle. Claimant testified her left knee improved following the surgery, though standing for extended periods caused pain. From November 2007 through November 2008, claimant worked part-time as a cashier, in addition to her regular job at respondent, and was required to stand for long periods. Claimant underwent treatment for her left knee during that time, including injections for tricompartmental osteoarthritis. Claimant testified she was told in 2007 she may eventually need a left total knee replacement. She indicated she had no problems with her left knee from the time she left her part-time position in 2008 until the accident of December 23, 2010. Claimant testified she did not recall receiving an injection to her left knee in July 2010, as indicated by her medical records.

Dr. Edward Prostic, a board certified orthopedic surgeon, first evaluated claimant on December 12, 2011, per claimant's counsel's request. Dr. Prostic reviewed claimant's history and medical records, including x-rays taken of claimant's left knee in 2011. He noted the radiology report of January 12, 2011, indicated claimant sustained a lateral patella fracture with no loss of alignment or joint space narrowing. X-rays dated June 1, 2011, were interpreted as showing mild bilateral osteoarthrosis, with mild narrowing of the medial joint space and no identified fracture or dislocation. Dr. Prostic performed a physical examination and took x-rays of claimant's left knee, which revealed "mild varus malalignment with moderate medial joint space narrowing and significant degeneration at the patellofemoral joint."<sup>1</sup> Dr. Prostic determined claimant needed additional conservative

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<sup>1</sup> Prostic Depo., Ex. 2 at 2.

treatment for her left knee, and should conservative treatment prove unsuccessful, a total knee replacement arthroplasty would be required.

In an Order dated March 2, 2012, the ALJ referred claimant to board certified orthopedic surgeon Dr. Pat Do for purposes of an independent medical evaluation (IME). Dr. Do reviewed claimant's medical records and history, noting the x-rays taken in January 2011 showed either an osteophyte or a bipartite patella. Dr. Do testified a bipartite patella is not a fracture, but rather a congenital condition where the kneecap has not fused. Dr. Do performed a physical examination and determined claimant has left knee pain, in part due to bipartite patella, and probable patellofemoral chondromalacia. Dr. Do opined claimant's accident of December 23, 2010, could aggravate, accelerate, and make active symptoms of her degenerative left knee condition. Regarding the necessity of a knee replacement, Dr. Do testified:

I have a little reluctance on the part of necessitated a knee replacement, because where she hurt it was in the non weight bearing portion of the joint, and we knew in the weight bearing portion of her joint way back when, she already had wear and tear.<sup>2</sup>

Claimant's left knee condition did not improve, and she eventually underwent a left total knee replacement with Dr. Dan Gurba of Dickson-Diveley Orthopaedics on May 21, 2013. Claimant returned to work at respondent following post-surgery recovery.

Claimant returned to Dr. Prostic on April 28, 2014, again at her counsel's request. Dr. Prostic reviewed claimant's updated history, medical records, took new x-rays and performed a physical examination. Dr. Prostic determined the results of claimant's surgery were "fair" as categorized by the AMA *Guides*.<sup>3</sup> He stated, "The x-ray appearance of the knee is excellent. The clinical appearance of the knee is not."<sup>4</sup> Dr. Prostic opined claimant sustained a total 50 percent impairment to the left lower extremity, with 10 percent preexisting, for a 40 percent impairment related to the 2010 work accident. He explained:

For total knee replacement, fair result, is 50 percent of the lower extremity or 20 percent of the body. As to preexisting, what I have as evidence of preexisting is that she had previous surgery by Dr. Mumford for chondroplasty in 2004. She told me she was doing reasonably well after that. And the x-rays taken four and a half months post-injury at Tallgrass June 1<sup>st</sup>, 2011, were interpreted as a showing mild osteoarthritis.

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<sup>2</sup> Do Depo. at 14-15.

<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>4</sup> Prostic Depo. at 23.

So if she had had good range of motion, good function and only mild changes on x-rays at that time I think that the rating that would be appropriate is in the neighborhood of 10 percent.<sup>5</sup>

Dr. Prostic testified that because joint space narrowing and malalignment did not appear in claimant's x-rays until June 2011, there is a progressive condition in the left knee which was aggravated by the work injury.<sup>6</sup> Dr. Prostic did not recommend any permanent restrictions, nor did he recommend additional treatment.

On September 22, 2014, claimant testified at the regular hearing she had developed pain in her left hip, which she attributed to putting additional pressure on her left knee. The ALJ ordered an IME from Dr. Gurba to provide a rating for claimant's left knee and to address whether claimant's left hip symptoms were a natural and probable consequence of the 2010 work-related accident.

Dr. Gurba examined claimant on October 30, 2014, at which time claimant complained of left knee and left hip pain. Dr. Gurba reviewed claimant's medical records, history, and took x-rays. He reported:

Per the AMA Guides to the Evaluation of Permanent Impairment 4<sup>th</sup> Edition, I would give [claimant] a 50% impairment of the left lower extremity, at the level of the knee, or 20% of the whole person. It is my opinion, within a reasonable degree of medical certainty, that the left hip osteoarthritis pre-existed the work injury to the left knee. I also believe that the injury, and subsequent treatment for the knee, did not aggravate the hip nor accelerate the need for hip replacement. Definitive treatment for the hip arthritis is joint replacement surgery. The prevailing factor for the need of hip replacement is the pre-existing osteoarthritis and not contributed to by compensatory factors from the knee. I feel that her current work status is appropriate.<sup>7</sup>

In an addendum to the ALJ dated January 27, 2015, Dr. Gurba further clarified his rating opinion. He wrote:

Of the [50% impairment], I would attribute 75% to arthritic changes pre-existing the work injury. I would attribute 25% of the impairment, due to aggravation and acceleration of her knee symptoms leading to a knee replacement, to the work injury of 12/23/2010.<sup>8</sup>

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<sup>5</sup> *Id.* at 11-12.

<sup>6</sup> See *Id.* at 29.

<sup>7</sup> Gurba IME (Oct. 30, 2014) at 4.

<sup>8</sup> Gurba IME Addendum (Jan. 27, 2015) at 1.

Claimant continues to work for respondent with no restrictions. She testified her left knee has improved since the 2013 surgery, though she has pain in her left hip and left leg.

#### **PRINCIPLES OF LAW**

K.S.A. 2010 Supp. 44-501(a) states, in part:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2010 Supp. 44-508(g) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

K.S.A. 2010 Supp. 44-501(c) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

#### **ANALYSIS**

The primary issue in this claim is the extent of preexisting impairment. The ALJ found claimant had a 10 percent preexisting impairment to the left knee. In finding so, the ALJ considered and found unpersuasive the opinion of Dr. Gurba, who was ordered by the ALJ to perform an evaluation. Dr. Gurba assessed a 50 percent impairment of the left lower extremity, with 75 percent of the 50 percent deemed to be related to preexisting arthritis. The Board can see no reason to give no weight to Dr. Gurba's independent medical opinion that 37.5 percent of claimant's impairment to the left knee is related to preexisting arthritic changes.

Dr. Prostic also assessed a 50 percent impairment to claimant's left lower extremity at the level of the knee. Dr. Prostic opined 10 percent of the total impairment was based upon preexisting arthritic changes. Respondent argues Dr. Prostic's opinion on preexisting impairment should be afforded little or no weight. Respondent notes Dr. Do did not find the injury to be the cause of claimant's knee pain. Dr. Do's opinion is refuted by the impairment ratings both Drs. Gurba and Prostic related to the December 23, 2010, work-related injury. The Board finds the opinions of Drs. Gurba and Prostic to be credible.

Based upon the opinions of Drs. Gurba and Prostic, the Board averages the two assignments of preexisting impairment and finds claimant possesses a 23.75 percent preexisting functional impairment to the left lower extremity at the level of the knee.

**CONCLUSION**

After subtracting the 23.75 percent preexisting portion of claimant's 50 percent impairment to the left lower extremity, claimant suffers a 26.25 impairment related to her December 23, 2010, injury by accident.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated March 12, 2015, is modified.

Claimant is entitled to 22.71 weeks of temporary total disability compensation at the rate of \$377.95 per week in the amount of \$8,583.24, followed by 46.54 weeks of permanent partial disability compensation at the rate of \$377.95 per week in the amount of \$17,589.79, for a 26.25 percent loss of use of the leg, making a total award of \$26,173.03, all of which is due and owing, less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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